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THE CONSTITUTION ABROAD: A STRUCTURAL ANALYSIS

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I. INTRODUCTION

One of the most perplexing questions facing courts today has to do with the extraterritorial reach of the US Constitution. Criminal statutes have been extended beyond US borders and questions of the rights of aliens both abroad and at home have been taking up more and more of the courts' time. In the last two terms, the Supreme Court has been asked to address what rights apply to a Mexican citizen shot in Mexico by a US Customs agent standing in the United States, as well as whether the First Amendment prevents the President from discriminating against aliens based on their religion. At the core of both of these cases is a fundamental question as to whether these aliens have the right to ask for the protections of our Constitution that Americans take for granted. The Court has managed to avoid grappling with either of these questions, finding other ways to resolve these cases.

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Its last two opinions in this area were nearly 20 years apart and use two entirely different analytical methods to reach their results. This doctrinal incoherence has led lower courts to address the question in a piecemeal fashion, often stretching the reasoning in one area to realms where it is wholly inappropriate. Lower courts have been left struggling with no clear overarching theory of extraterritorial application, addressing it on a clause-by-clause basis, with no internal consistency. Lawyers, law enforcement officers, and even members of Congress are left guessing as to what actions taken overseas will be upheld or struck down. A unifying theory is necessary.

This article posits that the answer to these questions can be found in the very bones of the Constitution. The structure of limited and enumerated powers, coupled with the further negative implications of the Bill of Rights, indicates that aliens do indeed have access to at least some of the protections of the Constitution. While the extent to which these rights extend is up for debate, recent scholarship has shown that at the very least, Due Process was understood to apply to aliens abroad since the time of the Founding. Thus, the argument from structure is consistent with an original understanding of the Constitution.

This article begins with an examination of the interpretive method known as structuralism. First proposed by Professor Charles Black in a series of lectures, structuralism argues that the relationship between the various pieces of the Constitution provides valuable insight to the interpretation of the document and has been the basis of several landmark Supreme Court decisions. Part II answers the question "What is structuralism?" and examines the basic structures of the Constitution. It then addresses what role the specific textual language of various clauses should play, particularly when they may appear, at first, to offer a different outcome then the argument from structure. It concludes with a brief discussion of drawbacks and critiques to the use of this method of interpretation. Part III then examines the question of the extraterritorial application of the Constitution. After providing a brief history of the landmark cases in this area, it turns to the meat of the question – what does

the structure of the Constitution tell us about its extraterritorial application? It walks through some of the major structural components of the Constitution and how they would or would not apply extraterritorially, before concluding with an examination of the Founding era and the early application of the Constitution outside U.S. borders.

II. THE STRUCTURAL CONSTITUTION

A. WHAT IS STRUCTURALISM?

When I speak of structuralism, I am referring to the ideas proposed by Professor Charles Black in his lectures.[1] Professor Black described the idea of looking holistically at the Constitution and the relationship between the various clauses as a vital part of constitutional interpretation.[2] He believed that by examining these broader structures, answers could be found to the meaning behind some of the more esoteric phrases contained in the document.[3]

This line of thinking was not unique to Professor Black. As several scholars have pointed out, the early Supreme Court relied on this type of reasoning in several major cases.[4] Perhaps the quintessential example can be found in Chief Justice John Marshall's opinion in *McCulloch v.*

[1] Charles L. Black, Jr., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[2] Id. at 7.

[3] It is perfectly clear what the Constitution means when it says the President must be 35 years old to qualify for office. But what makes punishment "cruel and unusual"? How do we know what process is due?

[4] Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 Marq. L. Rev. 693, 700-707 (Spring 2005) (describing *Marbury v. Madison* and *McColloch v. Maryland* as structural decisions). See also Glenn Reynolds, *Penumbral Reasoning on the Right*, 140 U. Pa. L. Rev. 1333, 1337-1343 (April 1992) (arguing that the doctrine of standing and sovereign immunity are themselves examples of structural reasoning); Brannon Denning & Glenn Reynolds, *Comfortably Penumbral*, 77 B.U.L. Rev. 1089, 1092-93 (December 1997) (referring to *McCulloch v. Maryland* as the "quintessential example" of structural reasoning).

Maryland.[5] As any student of Constitutional Law can tell you, in finding both the power to create a national bank, and a limit on the power of states to tax that bank, Marshall spoke in sweeping phrases about the constitutional design far more than he relied on specific provisions.[6]

Furthermore, Marshall's masterpiece, *Marbury v. Madison*, also relied on structural arguments.[7] While *Marbury* discussed the meaning of Article III, Marshall looked to the structure of the Constitution to explain why the Supreme Court both had the power and the duty to strike down unconstitutional laws.[8] This was a commonplace method of argument used by both early judges and those in the First Congress, several of whom were Founders themselves.[9]

This line of thinking has long had proponents on the Supreme Court. Although some uses have been heavily criticized,[10] the Rehnquist Court

[5] 17 U.S. (1 Wheat.) 316 (1819).

[6] *See, e.g., Id.* at 404-405 ("The Government of the Union then (whatever may be the influence of this fact on the case) is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); *Id.* at 405 ("This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted."); *Id.* at 407-408 ("Although, among the enumerated powers of Government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation and [e]ntrusted to its Government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a Government [e]ntrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be [e]ntrusted with ample means for their execution.") Other similar phrases are found throughout the opinion.

[7] 5 U.S. (1 Cranch) 137 (1803).

[8] Westover, *supra* note 4, at 700-702.

[9] Kent Greenfield, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 Conn. L. Rev. 79, 93-96 (Fall 1993).

[10] Chief among these criticized decisions is Justice Douglas's opinion in *Griswold v.*

used structural reasoning as part of its federalism revolution of the late twentieth century.[11] Perhaps nowhere, however, has structural reasoning been more plainly seen recently than in the Court's jurisprudence with regard to the Eleventh Amendment.[12]

B. THE STRUCTURE OF THE CONSTITUTION

It is commonplace to state that the Constitution sets up a government of limited, enumerated powers. Articles I through III carefully divide the legislative, executive, and judicial functions between three co-equal branches.[13] After providing a general vesting clause, each Article articulates specific powers and places limits, both explicitly and implicitly, upon those powers. Thus, in Article I, Section 8, Congress is granted the power to regulate commerce,[14] make rules for the Army and Navy,[15] grant letters of marque and reprisal,[16] and establish a uniform rule for naturalization,[17] among others. This is followed immediately by explicit

Connecticut, 381 U.S. 479 (1965). For examples of criticism on both the right and the left, see e.g. Robert H. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) at 99 and Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 292-94 (1973).

[11] *See, e.g. Printz v. United States*, 521 U.S. 898, 905 (1997) ("Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."); *Id.* at 918-923.

[12] *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999).

[13] This was a principal selling point made by the Federalist Papers. *See, e.g.,* Federalist Papers No. 14 ("In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any."); Federalist Papers No. 40 ("We have seen that in the new government, as in the old, the general powers are limited…."); Federalist Papers No. 78 ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like.").

[14] U.S. Const. Art. I, Sec. 8, cl. 3.

[15] U.S. Const. Art. I, Sec. 8, cl. 14.

[16] U.S. Const. Art. I, Sec. 8, cl. 11.

[17] U.S. Const. Art. I, Sec. 8, cl. 4.

limitations on Congress's power. Chief among these limitations, for our purposes, are the prohibition on *ex post facto* laws[18] and bills of attainder.[19]

The President is empowered to appoint ambassadors, judges, and other principal officers of the United States, but only by and with the advice and consent of the Senate.[20] He is Commander in Chief of the armed forces,[21] but cannot declare war.[22] If necessary, he can be removed by the legislative branch.[23] Finally, the Courts have the judicial power,[24] but they must provide a jury to anyone accused of a criminal act.[25]

These powers are further constrained by the Bill of Rights. The first ten amendments to the Constitution, rather than providing positive rights to the people, can more properly be read as providing negative rights against the Government.[26] There was some debate amongst the First Congress about the proper way to amend the document, i.e. whether the Bill of Rights should be interpolated into the Constitutional text, as opposed to appended on the end.[27] Had Madison won the day, most of what we now know as the Bill of Rights would have been placed in Article I, Section 9.[28] Thus, it is appropriate to read these provisions as further restrictions on the powers of

[18] U.S. Const. Art. I, Sec. 9, cl. 3.
[19] Ibid.
[20] U.S. Const. Art II, Sec 2, cl. 2.
[21] U.S. Const. Art. II, Sec. 2, cl. 1.
[22] U.S. Const. Art. I, Sec. 8, cl. 11.
[23] U.S. Const. Art. I, Sec. 2, cl. 5 and U.S. Const. Art. I, Sec. 3, cl. 6.
[24] U.S. Const. Art. III, Sec. 1, cl. 1.
[25] U.S. Const. Art. III, Sec. 2.
[26] A "negative" right is a right not to be subjected to an action of another person or group, in this case, the Government. A positive right, on the other hand, is an affirmative claim against a person or group. Thus, freedom from a search is a negative right, which limits the power of the government. A right to receive a free public education would be an example of a positive right. *See, e.g.*, Jorge M. Farinacci-Fernos, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to Their Nature, Effect, and Reach*, 41 Hastings Int'l & Comp. L. Rev. 31 (Winter, 2018).
[27] Nathan S. Chapman and Michael McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1722 (May, 2012).
[28] 1 Annals of Cong. 434 (1789) (Joseph Gales ed., 1834).

government, in line with the Constitution's overall design of creating a government of limited powers.[29]

C. DOES TEXT MATTER?

Justice Elena Kagan famously stated that "we are all textualists now," speaking of the great influence of Justice Antonin Scalia on the work of the Court.[30] And of course, no one would seriously dispute that the text matters when it comes to interpreting the document. But we must remember the guidance provided by Chief Justice Marshall in *McCulloch* when he reminded us that "it is a constitution we are expounding."[31] As he noted, because the document is a constitution, it is required to lay out the broad outlines of government and could not partake in the "prolixity of a code."[32] Thus, there are areas where the document speaks quite clearly and there are areas where the document leaves a lot of room to play in the constitutional joints. When we find ourselves in the latter areas, it behooves us to ask the appropriate method of interpretation and specifically the order of importance between the structure and the text.

ORDER OF IMPORTANCE

For many, the logical starting point when interpreting the Constitution is to look at the text. While this makes sense for clearly written text, when it comes to more open-ended provisions of the Constitution, I argue that courts should look to the structure of the document first, and then

[29] Several concepts that underlie the constitutional design find no express provision anywhere in the document. For example, the idea of limited government, the separation of powers, and popular sovereignty are all background principles that clearly illuminate the proper understanding of the Constitution, but do not have specific clauses that support or require them. *See, e.g.*, Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 30 (November, 2000).

[30] Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-intrepretation [http://perma.cc/3BCF-FEFR].

[31] 17 U.S. (1 Wheat.) at 407.

[32] *Ibid.*

look to whether there is specific language that modifies what the structure tells us.[33]

Based on the structure of the Constitution, our baseline understanding should be a document which enumerates certain powers in setting up a limited government. When looking at government action, our bias should be to limit the Government to its specifically articulated powers. When looking at those powers, we then need to see if later changes either expand or contract them.

The First Amendment, for example, places an additional limit on Congress's powers. It prevents it from passing laws which limit speech, press, establish religion, interfere with the free exercise of religion, hamper peaceable assembly and prevent petitioning the government.[34] The Fourteenth Amendment, on the other hand, grants Congress additional powers, not contained in Article I, to prevent states from denying their citizens due process or the equal protection of the laws.

Similar limits and expansions occur throughout the amendments to the document. Even the provisions of the base document should be interpreted in light of the general structures of the Constitution. This is what Marshall did in *McCulloch*.[35] Thus, the structure helps us understand and appropriately interpret the text.

THE EXAMPLE OF THE ELEVENTH AMENDMENT

The idea that structure can potentially trump text, even clearly written text, will likely seem anathema to many lawyers and legal scholars, especially those identifying themselves as textualists. But this interpretive method has a fine pedigree, even among judges who call themselves

[33] As will be shown in section (b), *infra*, the Supreme Court has followed this model even where the text is arguably clear.

[34] U.S. Const. Amend. I.

[35] 17 U.S. (1 Wheat.) 316 (1819).

textualists. The prime example is the Supreme Court's jurisprudence surrounding the Eleventh Amendment.

The Eleventh Amendment itself appears to be a very straightforward limitation of the Court's Article III jurisdiction: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[36] On its face, the Amendment only restricts lawsuits by citizens of one state against another state. But the Court has interpreted it much more broadly, arguing that it instead embodies an idea of sovereign immunity that prevents suits against states by their own citizens.[37]

Additionally, despite being directed at the federal judiciary's Article III jurisdiction, the Court has interpreted the amendment to prohibit suits against states in their own courts as well.[38] It also prevents Congress from subjecting states to suits under its Fourteenth Amendment power without meeting strict requirements.[39] The only exception was *Nevada v. Hall*, which allowed one state to subject a sister state to suits in its own courts.[40] However, the Court recently overturned this exception.[41]

In virtually every other case, the Court has eschewed the plain text of the Amendment in favor of a broader structural understanding, based on an unenumerated concept of sovereign immunity which the states possessed

[36] U.S. Const., Amend. XI.

[37] *See, e.g. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.'") (internal citations omitted); *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that a citizen of Louisiana could not sue that state in federal court absent its consent).

[38] *Alden v. Maine*, 527 U.S. 706 (1999).

[39] *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

[40] 440 U.S. 410 (1979).

[41] *Franchise Tax Board of California v. Hyatt*, 587 U.S. ___, 139 S. Ct. 1485 (2019).

prior to the Founding and never surrendered. Almost all of the recent cases have been authored by the Court's conservative majority, most of whom profess at least a modicum of respect for the text. Thus, it is hardly unprecedented to look to the structure of the Constitution, even in the face of clear text that would seem to dictate a different result.

DRAWBACKS AND ANSWERS

Since I am making a normative claim about the proper way to interpret the Constitution, it is necessary to address the common counterarguments to the use of structuralism, especially its use prior to consideration of the text. These arguments typically boil down to three: 1) the use of structure fails to provide any sort of limits or determinacy on its use, thus allowing a judge to justify whatever decision he or she wishes; 2) that the method is typically used to reach results that favor a particular side, namely liberal outcomes; and 3) that since the Constitution is a written document, the text should hold a place of primacy in any method of interpretation. I will address each in turn.

The first charge typically levelled against arguments from structuralism is that they do not provide any limits. A clever judge, the argument goes, can discern any structural principle she wishes from the broad outlines of the document.[42] Professor Black anticipated this argument, specifically from the quarter he was himself attacking, textualism, and essentially argued that "those who live in glass houses should not throw stones."[43] Specifically, Black charged that textualism could be just as indeterminate as structuralism was charged with being.[44] He further elaborated:

[42] Ernest Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 Wm. & Mary L. Rev. 1601, 1636-37 (May 2000). Westover*, supra* note 4, at 712-13.

[43] Westover, *supra* note 4, at 713.

[44] Black, *supra* note 1, at 49 ("I should reply that there is no loss whatever in certainty, as against the actually prevalent mode [of interpretation]."

> The question is not whether the text shall be respected, but rather how one goes about respecting a text of that high generality and consequent ambiguity which marks so many crucial constitutional texts. I submit that the generalities and ambiguities are no greater when one applies the method of reasoning from structure and relation.[45]

Indeed, Black believed that examination of the text was a crucial part of the structural enterprise, as "the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text."[46]

Other scholars have gone further, offering justifications for structuralism that do not rely on casting aspersions on other methods of interpretation.[47] Specifically, they argue that because it depends on the application of principles derived from the text of the Constitution, it contains within itself a means of limiting its reach.[48] Only those principles which can be fairly derived from the text are valid exercises of the doctrine.[49]

Professor Ernest Young has argued that constitutional "big ideas" help provide limits on structural interpretation because they themselves are often quite robust, with a history and discussion that fleshes out their implications across a range of areas.[50] As he points out, the biggest limit on structuralism is that it requires some textual hook.[51] As with all forms of constitutional interpretation, such as textualism or originalism, there are

[45] Id. at 30-31.
[46] Id. at 31.
[47] Westover, *supra* note 4, at 713.
[48] Id. at 713-14.
[49] Id. at 714.
[50] Young, *supra* note 42 at 1641 (discussing the robustness of sovereign immunity as a structural "big idea."). But see Westover's critique of "big ideas" structuralism for searching for principles outside the Constitutional text. Westover, *supra* note 4, at 718.
[51] Young, *supra* note 42, at 1633.

good structuralists and bad structuralists. The fact that some use the method badly is not a criticism of the method itself.[52]

Professors Brannon Denning and Glenn Reynolds go further and argue that structuralism (what they call "penumbral reasoning") is less subject to abuse than other interpretive methods "'because it ties the development of new principles to the overall structure and purposes of the Constitution…'"[53] They argue that structuralism is more accessible to the public than other forms of reasoning and it does not depend on either "clumsy textual manipulation" or "law office history."[54] Furthermore, they argue, structuralism can help solve the so-called "inkblot" problem identified by Judge Bork, and allow for interpretation of particularly tricky provisions, such as the Ninth and Tenth Amendments and the Necessary and Proper Clause.[55]

Finally, the mere pedigree of structuralism helps to commend its legitimacy.[56] Numerous scholars have pointed out that many of the major cases in the constitutional canon rely on structural reasoning.[57] In addition to these early cases, such as *Marbury v. Madison*[58] and *McCulloch v. Maryland*,[59] structuralism has continued to play a role in later cases, most

[52] Westover, *supra* note 4, 709-711. Young, *supra* note 42, at 1673-1675.

[53] Denning & Reynolds, *supra* note 4, at 1118, quoting Reynolds, *supra* note 4, at 1346.

[54] Id. at 1118.

[55] Id. at 1119.

[56] Westover, *supra* note 4, at 715.

[57] Id. at 700-707 (discussing the structural reasoning employed in *Marbury v. Madison*, *McCulloch v. Maryland*, and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). See also Reynolds, *supra* note 4, at 1337-1343 (arguing that the doctrine of standing and sovereign immunity are themselves examples of structural reasoning); Denning & Reynolds *supra* note 4, at 1092-93 (referring to *McCulloch v. Maryland* as the "quintessential example" of structural reasoning); Black, *supra* note 1, at 13-15 (explaining the structural reasoning in *McCulloch v. Maryland*).

[58] 5 U.S. (1 Cranch) 137 (1803).

[59] 17 U.S. (1 Wheat.) 316 (1819).

notably *Youngstown Sheet & Tube Co. v. Sawyer*,[60] *Alden v. Maine*,[61] and the much-maligned *Griswold v. Connecticut*.[62]

The second criticism, largely based on criticisms of *Griswold*, is that structuralism is used to support primarily liberal outcomes, and therefore it should be rejected.[63] First, this criticism is merely the flip side of that often leveled against originalism, and should be accorded approximately the same weight. Second, and more importantly, it is demonstrably untrue. Professor Glenn Reynolds has persuasively argued that what he calls "penumbral reasoning" is often embraced by certain conservative members of the Court when it suits the outcomes they wish to achieve.[64] For example, the doctrine of standing and its cohorts, such as ripeness, mootness, and the political question, which are often used as a means of closing the courthouse doors to litigants, are not demanded anywhere in the text of Article III. Even Robert Bork noted these doctrines relate to an idea "which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[65]

Similarly, as noted above, many of the Court's decisions regarding sovereign immunity have been signed off on by conservative justices, yet seem to fly in the face of the clear language of the 11th Amendment.[66] Federalism decisions, largely viewed as conservative, have also been shaped in large part by structuralism.[67] Cases involving the dormant commerce clause, which seem to have no particular ideological valence,

[60] 343 U.S. 579 (1952).

[61] 527 U.S. 706 (1999).

[62] 381 U.S. 479 (1965). Regardless of what one thinks of the quality of the structural argument deployed in *Griswold*, it is undoubtedly based entirely on an argument from constitutional structure.

[63] Reynolds, *supra* note 4, at 1333.

[64] Ibid.

[65] *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

[66] See, *supra*, notes 35-39 and accompanying text.

[67] Denning and Reynolds, *supra* note 4, at 1101-1106.

have also relied on structural reasoning.[68] Not all of these cases are examples of structuralism well practiced, but all of them rely on structural reasoning to some extent and demonstrate that structuralism, far from dictating liberal outcomes, appeals to judges of all stripes.

Finally, arguments from structuralism, especially as I have argued for their application, must grapple with the claim that a written constitution demands adherence to the text, rather than to vague principles intuited from the structure and interrelation of textual provisions.[69] Aside from the fact, noted above, that structuralism, when properly practiced, cannot be divorced from the text of the Constitution, there is an argument that it actually provides a "unique ability to balance two fundamental, but seemingly contradictory, tenets of constitutionalism – that the Constitution must be flexible enough to apply across time to unforeseen circumstances, and that we must adhere to the text of the Constitution."[70]

As Chief Justice Marshall famously pointed out, a Constitution cannot "partake of the prolixity of a legal code…Its nature, therefore requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deducted from the nature of the objects themselves…."[71] In other words, it is impossible for a Constitution to be written in such a way that it answers every constitutional question.[72] Structuralism thus helps fill in the

[68] Id. at 1108-1113.

[69] For one version of this argument, see John Harrison, *Book Review: Review of Structure and Relationship in Constitutional Law*, 89 Va. L. Rev. 1779 (Nov. 2003). However, I note that Professor Harrison criticizes "large-scale principles that are divorced from text." Id. at 1789. As noted above, while some accounts of structuralism, such as Professor Young's "big ideas" structuralism, may depart from the text, that is not the case with all structuralism. Indeed, Professor Black himself rejected the idea of supplanting precision with wide-open speculation. Black, *supra* note 1, at 29.

[70] Westover, *supra* note 4, at 716.

[71] *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 407 (1819).

[72] Westover, *supra* note 4, at 716.

inevitable gaps, as well as helping give content to broad concepts protected by the Constitution, such as due process of law.[73]

Certainly one can take issue with my suggestion that the structure should be considered prior to the text. However, as will be explained in more detail below, when the text and the structure are out of sync, I do not advocate jettisoning the text in favor of structure. Rather, my method is to start with a presumption from structure and then search to see if the text provides a reason to undercut that presumption. If so, it may well be evidence that the principle I have discerned is incorrect.[74]

III. STRUCTURE AND EXTRATERRITORIAL APPLICATION

The structure of the Constitution provides some guidance on the question of whether the document should be properly read to apply "extraterritoriality," that is, beyond the physical borders of the United States. But defining what we mean by the extraterritorial application of the Constitution is a surprisingly tricky task. When we say a statute applies extraterritorially, it is fairly straight forward: a statute applies extraterritorially if it reaches conduct that occurs outside the physical borders of the United States. Thus, attempts to regulate the drug trade in Colombia are an example of the extraterritorial application of federal drug laws.

[73] Regardless of what one thinks of textualism, it must be admitted that this bare phrase provides no guidance as to what content the Fifth and Fourteenth Amendment protects. Even the best textualists have been able to opine that the clause "protects only that process which is due." *See e.g. People's Mojahedin Organization of Iran v. Department of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003) *citing Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands."). This sort of guidance is clear as mud.

[74] Again, I would also note that even those jurists who claim to be strict textualists have not shied away from ignoring the clear text of the Eleventh Amendment when clinging to principle suited their ends. However, I freely acknowledge that this is evidence of poorly practiced structuralism, rather than a justification for ignoring a clear textual command.

When it comes to the Constitution, however, things are a bit trickier. After all, the Constitution can only be applied by courts, and absent very specific circumstances, all U.S. courts sit within the territorial boundaries of the United States.[75] Thus, there is a very real question about whether, when a court applies the Due Process Clause of the Fifth Amendment to an alien defendant sitting before it, it is engaging in extraterritorial application.[76] In some cases, it seems easier to determine if the Constitution is being applied overseas, even if the court sits in the United States. The Fourth Amendment is one such example.[77] In *United States v. Verdugo-Urquidez*, the Supreme Court was asked to decide if a search of a Mexican national's home, in Mexico, by the Drug Enforcement Administration, in cooperation with the Mexican Federal Judicial Police, violated the defendant's Fourth Amendment rights such that the evidence needed to be suppressed.[78] In a 6-3 decision, the Court held that the Fourth Amendment did not apply outside the territorial bounds of the United States, at least as far as foreign nationals were concerned.[79]

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[75] There are, and have been, some exceptions. The most common exception is courts martial, which often sit wherever the military is deployed. *See e.g. Reid v. Covert*, 354 U.S. 1 (1957). Another, now defunct example, were U.S. consular courts, which sat in foreign countries pursuant to treaties between the United States and those countries. *See e.g. In re Ross*, 140 U.S. 453 (1891). Another current example would be the military commissions sitting in Guantanamo Bay, Cuba. *See e.g. Boumediene v. Bush*, 553 U.S. 723 (2008).

[76] See e.g. *First Investment Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd. et al*, 703 F.3d 742 (5th Cir. 2012) (holding that an alien corporation is present in the United States for due process purposes through its attorney).

[77] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

[78] *Id.*

[79] *Id.* Justice Kennedy provided the fifth vote and wrote a special concurrence. While he said that his reasoning did not conflict with that of the majority, both courts and scholars have divided on this question. There is a surprising and ongoing debate, both amongst scholars and lower courts, about whether Chief Justice Rehnquist's opinion is a majority or a plurality opinion.

Cases that treat the Rehnquist opinion as a majority include *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014) (*Hernandez I*); *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007); and *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254 (D. Utah 2003). *But see Sissoko v. Rocha*, 440 F.3d 1145 (9th Cir. 2006), *superseded by* 509 F.3d

The Court has also addressed the Due Process rights of foreign corporations in the context of state long arm statutes, deciding several cases about the ability of courts to exercise personal jurisdiction over foreign defendants who lack minimum contacts with the forum.[80] In those cases, the Court has not examined the question of whether applying the Due

947 (9th Cir. 2007) (referring to Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* as a plurality); *United States v. Boynes*, 149 F.3d 208 (3rd Cir. 1998) (same); *Lamont v. Woods*, 948 F.2d 825 (2nd Cir. 1991) (same); *Kadi v. Geithner*, 42 F. Supp. 3d 1, (D.D.C. 2012) (same); and *United States v. Guiterrez*, 983 F. Supp. 905 (N.D. Cal. 1998) *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999) (same).

The scholarly literature is similarly divided. See e.g. Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973 (June 2009); Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 Vand. L. Rev. 1373 (October 2014); Jesse Merriam, *A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous*, 21 Wm. & Mary Bill of Rts. J. 171 (October 2012); Alec Walen, *Constitutional Rights for Nonresident Aliens: A Doctrinal and Normative Argument*, 8 Drexel L. Rev. 53 (Fall 2015); Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question*, 30 B.U. Int'l L. J. 135 (Spring, 2012); and Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment after* Boumediene *and the Relationship Between* Habeas Corpus *and Due Process*, 14 U. Pa. J. Const. L. 719 (February 2012) calling it a majority. But see The Honorable Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801 (June 2013); Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo*, 20 Berkeley La Raza L.J. 89 (2010); Netta Rotstein, Boumediene *vs.* Verdugo-Urquidez: *The Battle for Control Over Extraterritoriality at the Southwestern Border*, 93 Wash. U. L. Rev. 1371 (2016); D. Carolina Nunez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. Cal. L. Rev. 85 (Nov. 2011); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. Cal. L. Rev. 259 (January 2009); and Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 Mich. L. Rev. 673 (March 2010) calling it a plurality.

The U.S. Reports refer to Chief Justice Rehnquist's opinion as a majority opinion.

[80] *See Perkins v. Benguet Consolidated Mining Co., et. al.*, 342 U.S. 437 (1952), *Insurance Corp. of Ireland, Ltd., et. al v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694 (1982), *Helicopteros Nacionales de Columbia, S.A. v. Hall et. al*, 466 U.S. 408 (1984), *Asahi Metal Industry Co. Ltd. v. Superior Court of California, Solerno County*, 480 U.S. 102 (1987), *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler, AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746 (2014).

Process Clause constitutes an extraterritorial application of the Constitution.[81] When lower courts have done so, they have indicated that the foreign defendant is present in the United States through the person of their attorney.[82] This is a far cry from the Rehnquist opinion's requirement in *Verdugo-Urquidez* that a foreigner must have "substantial connections" with the United States to claim the protection of the Constitution.[83]

Still, *Verdugo-Urquidez* does provide some guidance on this question. In differentiating between the Fourth Amendment's protections against unreasonable searches and seizures and the Fifth Amendment's prohibition against compelled testimony, the Court noted that the violation of the Fourth Amendment was complete at the time a location or person was searched and items or persons were seized.[84] The right against self-incrimination, however, is not implicated until the confession is sought to be introduced at trial, which occurs in the United States.[85] Thus, it appears that for purposes of determining whether the Constitution is applying extraterritorially, the proper inquiry is to ask where and when does the alleged constitutional violation happen?[86]

[81] Id. See also Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 19-20 (Spring 2006).

[82] *See e.g. First Investment Corp. of the Marshall Islands, supra note 76.*

[83] 494 U.S. at 271.

[84] *Id.*

[85] *Id.*

[86] This inquiry, particularly in regards to the Fifth Amendment's right against self-incrimination, has become trickier as courts have looked to the conditions under which the testimony sought to be admitted was produced. *See e.g. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Thus, in cases in which the interrogation took place overseas, it may not be as clear cut as the *Verdugo-Urquidez* court made it out to be. *See* Mark A. Godsey, *The New Frontier of Constitutional Confession Law – The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 Geo. L.J. 851 (April 2003). A more in-depth examination of this problem will be examined, *infra*, in Section IV(E)(3).

A. THE HISTORY OF THE EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION

Most conventional accounts of the extraterritorial application of the Constitution begin with the Supreme Court's declaration in *In re Ross* that "the Constitution can have no operation in another country."[87] In *Ross*, the Supreme Court was dealing with an appeal from a judgment of death by a consular court sitting in Japan. The defendant was a Canadian citizen working on an American-flagged vessel, who murdered a shipmate in Yokahama Harbor.[88] Under the terms of a treaty with Japan, Ross was tried and convicted in a consular court by the US Consul General.[89] He was sentenced to death and transferred to the United States.[90] Ross challenged his conviction on two grounds - first, he argued that as a Canadian citizen, he was not subject to the jurisdiction of the consular court.[91] Second, he argued that he could not be held for the charge except upon presentment or indictment of a grand jury, under the terms of the Fifth Amendment.[92] The Court rejected both arguments. As a sailor on an American-flagged vessel, Ross was subject to American law.[93] As to the claim under the Fifth Amendment, the Court stated that the Constitution created a government for the United States, not for the world.[94] The Court held the Constitution had no reach outside the territorial boundaries of the United States.

The Court next addressed the question at the turn of the twentieth century in *The Insular Cases*. *The Insular Cases* were a series of Supreme Court decisions dealing with the application of the Constitution to the so-called "insular territories;" those acquired after

[87] 140 U.S. at 464.
[88] *Id.* at *2.
[89] *Id.* at *1
[90] *Ibid.*
[91] *Id.* at *3
[92] *Ibid.*
[93] *Id.* at 473.
[94] *Id.* at 464.

the Spanish-American War.[95] These included, at the time, Puerto Rico, Cuba, and the Philippines. Today, they apply with equal force to Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. The cases covered multiple provisions of the Constitution, beginning with the Uniform Duty Clause of Article I,[96] and encompassing the right to a jury trial under the Sixth Amendment.[97] The Court created the "Territorial Incorporation Doctrine," which held that territories which were not intended for eventual statehood were not governed by the full panoply of the Bill of Rights.[98] The Court ultimately concluded that, while fundamental rights would apply of their own force to these territories, procedural rights, like the jury trial, would not apply unless Congress took some affirmative steps.[99]

The Court returned to the question following the Second World War, in *Johnson v. Eisentrager*.[100] *Eisentrager* addressed the question of whether foreign enemies, who had never set foot in the United States, could claim the protections of the Constitution, specifically, the Due Process Clause of the Fifth Amendment.[101] Eisentrager was one of twenty-one German prisoners of war, who were captured and tried by

[95] There is some dispute as to the exact make-up of the *Insular Cases*, with different scholars including different cases within the collection. See e.g. Jesse Merriam, *supra* note 79 at 183 n. 85 (October, 2012). However, there seems to be general agreement that it includes, at least *Downes v. Bidwell*, 182 U.S. 244 (1901), *DeLima v. Bidwell*, 182 U.S. 1 (1901), and *Dorr v. United States*, 195 U.S. 138 (1904). Finally, most scholars also agree that *Balzac v. Porto Rico*, 258 U.S. 298 (1922), where Justice White's "territorial incorporation doctrine" garnered the support of a majority of the Court for the first time belongs in the list. See, e.g. Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 Case W. Res. L. Rev. 147, 163 (2006).

[96] *See e.g. Downes v. Bidwell*, 182 U.S. 244 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901).

[97] *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

[98] Tauber, *supra* note 95, at 148.

[99] *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922). See also Tauber, *supra* note 95, at 167-168.

[100] 339 U.S. 763 (1950).

[101] *Id.*

military commission in China and transferred to an American-run prison in Germany for incarceration.[102] They sought a writ of *habeas corpus* in the District Court for the District of Columbia, arguing that their trial and continued detention violated Articles I and III of the Constitution, as well as the Fifth Amendment.[103] The Court denied the claim. It held that enemy aliens, with no ties to the United States, had no right to claim the protections of the Fifth Amendment.[104]

Two key arguments come from this case: 1) "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."[105] In other words, the more contact an alien has with the United States, the greater his claims on the protections of the Constitution; and 2) "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it."[106] Here, the Court argued that there was simply no history of applying domestic rights outside of the sovereign territory of any country and that surely such a change would have led to some debate at the Founding. Absent some evidence that the Founders intended the Constitution to apply abroad, even the expansive language of the Fifth Amendment could not stretch that far.

Just seven years later, the Court took a different tack, at least where U.S. citizens were concerned, in *Reid v. Covert*.[107] *Reid* actually consolidated two cases, both dealing with wives of servicemen who

[102] *Id.* at 765-766.
[103] *Id.* at 767.
[104] *Id.* at 777-778.
[105] *Id.* at 770.
[106] *Id.* at 784-785 (internal citations omitted).
[107] 354 U.S. 1 (1957).

murdered their husbands while stationed overseas.[108] Both were tried by military courts martial and sentenced to life imprisonment.[109] They argued that such courts martial violated the Fifth and Sixth Amendments.[110] Here, the Court sided with the women. In a four-justice plurality opinion, Justice Hugo Black wrote:

> At the beginning, we reject the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[111]

Justice Black would have emphatically protected the rights, at least of American citizens, to the protection of the Constitution, wherever the United States attempted to prosecute them. In addressing *Ross* and *The Insular Cases*, Black believed they were relics of history and best left there.[112] His ultimate conclusion was that, in contrast with *the Insular Cases*, the entire Bill of Rights applied wherever American citizens could be found. "[W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments."[113]

[108] *Reid v. Covert* and *Kinsella v. Krueger*.
[109] 354 U.S. at 4.
[110] *Id.* at 5.
[111] *Id.* at 5-6 (footnotes omitted).
[112] *Id.* at 12, 14.
[113] *Id.* at 9.

The second Justice Harlan concurred, but on much narrower grounds.[114] He argued that the proper way to judge when the protections of the Constitution should apply is when providing those protections would not be "impracticable or anomalous."[115] In this case, given that the women faced the penalty of death, it was not impracticable or anomalous to provide a jury trial. Therefore, the Government should be required to transport them home and try them before a civilian court.[116]

The issue did not reach the Court again until 1990, when it decided *United States v. Verdugo-Urquidez*.[117] *Verdugo-Urquidez* concerned a claim by a Mexican national that a search of his home, in Mexico, by agents of the U.S. Drug Enforcement Agency, violated the Fourth Amendment, because they lacked a warrant.[118] After he was arrested and brought to the U.S. for trial, DEA agents searched his home.[119] He argued that the evidence should be suppressed.[120]

Chief Justice Rehnquist wrote an opinion for the Court holding that the Fourth Amendment did not apply to foreigners who lacked "substantial connections" with the United States.[121] Specifically, he wrote: "[The Fourth Amendment], by contrast with the Fifth and Sixth Amendments, extends its reach only to 'the people.' ... 'the people' seems to have been a term of art employed in select parts of the Constitution."[122] Because the Fourth Amendment protected only "the

[114] *Id.* at 65 (Harlan, J., concurring).

[115] *Id.* at 74 (Harlan, J., concurring).

[116] *Id.* at 77 (Harlan, J., concurring). Just three years later, a majority of the Court would extend the holding of *Reid* to a non-capital crime in *Kinsella v. Singleton*, 361 U.S. 234 (1960).

[117] 494 U.S. 259 (1990).

[118] *Ibid.*

[119] *Id.* at 262

[120] *Id.* at 263.

[121] *Id.* at 259. See *supra* note 79 for a discussion of the controversy over whether Rehnquist's opinion is a majority or plurality.

[122] *Verdugo-Urquidez*, 494 U.S. at 265.

people" and since Verdugo-Urquidez's only connection to the United States was his presence for trial, he was not protected.[123]

Justice Kennedy joined the majority opinion, but also filed a concurring opinion.[124] While he stated that his opinion did not differ from the majority's, he rejected the majority's linguistic argument and relied instead on Justice Harlan's "impracticable and anomalous" test from *Reid*, holding that it would be impractical to apply the Fourth Amendment's warrant requirement outside the United States.[125] First, there were no judges with jurisdiction to issue such a warrant; second, Mexican notions of privacy might be so foreign to our own as to make a judgment about the reasonableness of the search impossible; and third, applying the Fourth Amendment could interfere with our relations with the Mexican government.[126]

Justice Brennan, joined by Justice Marshall, rejected the arguments of the majority and concurrences, echoing Justice Black's arguments in *Reid*. He wrote that the Constitution is both the source of Congress's authority to criminalize conduct abroad and the Executive's authority to investigate and prosecute such crime, but also proscribes limits on those powers, whether exercised at home or abroad.[127] Justice Brennan argued that the Fourth Amendment is "an unavoidable correlative of the Government's power to enforce the criminal law."[128]

He argued that the term "the people" has no special significance other than in contrast to "the Government."[129] The Bill of Rights was

[123] *Id.* at 274.
[124] *Id.* at 275 (Kennedy, J., concurring).
[125] *Id.* at 278 (Kennedy, J., concurring).
[126] *Ibid*. (Kennedy, J., concurring). Justice Stevens also concurred. While he agreed the Warrant Clause did not apply in Mexico, he believed that the search would still have to be reasonable. Because it was conducted with the cooperation of the Mexican authorities, the search met this requirement. *Id.* at 279 (Stevens, J., concurring).
[127] *Id.* at 281 (Brennan, J., dissenting).
[128] *Id.* at 282 (Brennan, J., dissenting).
[129] *Id.* at 287 (Brennan, J., dissenting).

designed not to create rights, but to prohibit the Government from infringing rights and liberties presumed to be pre-existing.[130] He noted that the focus of the Fourth Amendment is on what the Government may and may not do, not on against whom such actions may be taken.[131]

Most recently, the Court addressed the application of the Constitution to prisoners held at Guantanamo Bay, Cuba as part of the Global War on Terror.[132] Breaking from this long line of cases, the Court held that the Constitution applied to potentially enemy aliens who had never set foot in the United States.[133] Writing for the Court, Justice Kennedy convinced a majority to adopt the "impracticable and anomalous" test from *Reid* (and his own concurrence in *Verdugo-Urquidez*) when it held that the writ of *habeas corpus* could not be denied to enemy aliens held in U.S. military custody in Guantanamo Bay, Cuba.[134] Under the Suspension Clause of Article I, the writ of *habeas corpus* may only be suspended by Congress during times of rebellion or civil unrest.[135] Furthermore, because the United States exercises *de facto* sovereignty over the naval base at Guantanamo Bay, the prisoners are, for all intents and purposes, within U.S. territory.[136] Given this U.S. control, it would not be impracticable or anomalous to extend the writ of *habeas corpus* to those imprisoned on the island.[137] Although the Court did not formally overrule any of its prior precedents on the extraterritorial application of the Constitution, *Boumediene* represents a break with this line of cases, extending at least portions of the Constitution even further than Justice Black advocated for in his *Reid* plurality.

[130] *Id.* at 288 (Brennan, J., dissenting).
[131] *Ibid.* (Brennan, J., dissenting).
[132] *Boumediene v. Bush*, 553 U.S. 723 (2008).
[133] *Id.*
[134] *Id.* at 759-760.
[135] U.S. Const., Art. I, Sec. 9, cl. 2.
[136] *Boumediene*, 553 U.S. at 755.
[137] *Id.* at 798.

Having completed this brief history of the case law surrounding the extraterritorial application of the Constitution this article next turns to the question of what the structure of the Constitution can tell us about the proper answer to these questions.

B. WHAT STRUCTURE TELLS US ABOUT EXTRATERRITORIAL APPLICATION

The argument of this article begins with Justice Black's plurality opinion in *Reid v. Covert* and Justice Brennan's dissent in *United States v. Verdugo-Urquidez*. The general idea is that the Government established by the Constitution is one of limited powers, and that when Congress and the Executive act, they do so pursuant solely to the powers granted to them by the Constitution.[138] Thus, the powers and limitations built into the document travel together, opposite sides of the same coin. As Justice Brennan put it, the limitations of the Constitution are unavoidable correlatives to the powers being exercised.

Justice Black, of course, was looking at the structure as it applied to American citizens. Justice Brennan took a more universal view of the limits on Government power. It seems fairly unexceptional to argue that the Constitution protects American citizens from the excesses of federal government power wherever they are found. The case for aliens is tougher. While there are undoubtedly aspects of the Constitution that apply universally, there may be other sections that aliens may not claim the protection of. In order to determine which are which, this article will next look to a theory of which rights an alien can seek to vindicate in U.S. courts. In this, it will make both descriptive and normative claims.

"STANDING" TO ENFORCE

In my opinion, the best way to discuss which rights aliens can seek to enforce is to analogize from the concept of Fourth Amendment

[138] See note 13.

"standing."[139] Separate from Article III standing, this concept speaks to the idea that not everyone is in a position to challenge an illegal search and seek to have illegally seized evidence suppressed. While the Court has cautioned practitioners against using the term standing,[140] it has from time to time used this locution itself.[141]

A simple example would be the case of two individuals, Andy and Bill, conducting a drug deal in Andy's house, when the police charge in without a warrant. Andy will have "standing" to challenge the search of his home. Bill, however, lacks the expectation of privacy in Andy's home which would place him in a position to raise a similar challenge. Simply put, Bill had no claim to the protection of the Fourth Amendment in Andy's home. A similar examination can be made of other rights which can help answer whether aliens are in a position to enforce the limits the Constitution places on Government action.

SUBJECT/OBJECT

The text can certainly provide some guidance on this question. As argued above, I believe that the structure is the appropriate starting point, and then one should examine the text to see if it undercuts the conclusion drawn from structure.[142] One important thing to consider when examining the text is both the subject of the text, to determine if a right is being protected or a power is being constrained, as well as the object of the text, to see if it is directed to individuals or against the federal government.[143]

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[139] See e.g. Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 320 (December 2012).

[140] *Rakas v. Illinois*, 439 U.S. 128, 133 (1978).

[141] *Byrd v. United States*, 584 U.S. ____ (2018), slip op. at 14.

[142] See, *supra*, Part II(C)(a).

[143] See, generally, Zachary Margulis-Ohnuma, *The Unavoidable Correlative: Extraterritorial Power and the United States Constitution*, 32 N.Y.U. J. Int'l L. & Pol. 147 (Fall, 1999).

Different provisions are phrased differently, and some even draw distinctions within the same Amendment. For example, the First Amendment, by its plain text, is written as a restriction on Congress.[144] Congress shall make no law establishing religion or prohibiting free exercise, speech, or press. These protections have no direct limitations as to whose religion or speech Congress may legislate against. The final clause, however, changes tack and refers explicitly to "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[145] Does this language indicate that different groups may have standing to enforce different provisions? Can an alien claim the right to freely exercise her religion, but not to peaceably assemble?

The Fourth Amendment protects "persons, houses, papers, and effects" belonging to "the people."[146] In stating that such a right is not to be violated, it seems to indicate not the creation of a right, but rather the protection of a right understood to be pre-existing.[147] In its latter half, the warrant requirement uses the passive voice and appears to be a limitation on Government action, more than a right held by the people.[148]

Similar language can be found throughout the Constitution. Even assuming Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* is correct, and the term "the people" is a term of art which limits the reach of the Constitution, that does not apply to every Amendment or constitutional limitation.[149] The next subsections will examine the specific language of certain constitutional provisions and ask if, consistent with the structure, they militate in favor of or against their extraterritorial application.

[144] U.S. Const. Amend. I.
[145] Ibid.
[146] U.S. Const. Amend. IV.
[147] Margulis-Ohnuma, *supra* note 143, at 168.
[148] Ibid.
[149] Ironically, as noted above and by Margulis-Ohnuma, *supra* note 143, at 168, the purported term of art does not directly apply to the warrant requirement, which was the focus of the question in *Verdugo-Urquidez*.

ARTICLE I, SEC 9

The structure is plain to see when looking at the first seven articles of the Constitution. For example, Article I lays out the powers of Congress.[150] After laying out the specific enumerated powers of Congress in Article I, Section 8, the Constitution then turns to specific limits on those powers.[151] These limitations do not speak of rights of people, but rather areas that Congress may not intrude upon or actions it may not take.

Article I, Section 9, Clause 3 lays out two limits on Congress's power: it may not pass Bills of Attainder nor may it enact *ex post facto* laws.[152] They are not limited in their objects; anyone may claim their protection. This is demonstrated by the fact that these are specific limits on Congress's power, which includes the authority to define extraterritorial crimes.[153]

Congress is empowered to "define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations."[154] By their very definition, crimes committed on the high seas are extraterritorial in nature. But there can be no dispute that Congress is unable to criminalize felonies on the high seas which took place in the past. If the *ex post facto* clause serves as a limit on Congress's Article I powers, it must apply to the Define and Punish Clause as well. Thus, given its location in the structure of the Constitution, it is axiomatic that someone brought to trial in the United States would have "standing" to challenge the law under which he is being prosecuted as *ex post facto*.

This structural understanding is bolstered by the text of the clause itself. Nothing in the language of the clause indicates any limitations on its content, either by subject or geography. Thus, the plain language of the

[150] U.S. Const., Art. I.
[151] U.S. Const., Art. I, Sec. 9.
[152] U.S. Const., Art. I, Sec. 9, cl. 3.
[153] U.S. Const., Art. I, Sec. 8, cl. 10.
[154] Ibid.

clause prohibits the passing of *ex post facto* laws, regardless of whether those laws are passed under Congress's "Define and Punish" power.

The same is true of the limitation on Bills of Attainder. Congress is categorically prohibited from singling out an individual or small group for punishment. Nothing in the text of this prohibition would prevent it from being enforced by an alien, even one who had never entered the United States. Thus, in this case, the structure and the text of the Constitution work together and indicate that these specific limitations on Congress's power are enforceable by anyone who finds themselves targeted by a Bill of Attainder or *ex post facto* law. Under either clause, the structure and text of the Constitution would support a finding of "standing" to seek enforcement.

ARTICLE III, SEC 2

Article III also provides structural support for the argument that the Constitution should be read to apply wherever the federal government acts. Article III, Section 2, Clause 3 states: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."[155] This language clearly contemplates that some crimes subject to the jurisdiction of the United States will occur outside any of the states. And this makes complete sense. This language implements Article I's power under the "Define and Punish" clause. Congress may define and punish piracy and other felonies committed on the high seas, which by definition are outside the territorial boundaries of the United States. But it may not do so without providing the requisite protection of a trial by jury.

Here again, the structure of the Constitution and the text both support its extraterritorial application. Congress has the power to define crimes which occur outside the United States. But in our system of divided

[155] U.S. Const. Art. III, Sec. 2, cl. 3.

government, only the judicial branch may adjudicate those defined crimes. Therefore, Article III provides the means of implementing Congress's definitions. The judicial power is extended to all crimes, regardless of location, cabined only by the need to try those crimes before a jury. Congress is granted additional power to define where that jury sits, but there can be no argument that the jury is not required even for those crimes that occur on the high seas.

EXTRATERRITORIAL APPLICATION OF THE BILL OF RIGHTS

The argument from structure in regards to the Bill of Rights may have been easier had James Madison's initial proposal to interpolate them into the appropriate portions of the Constitution been accepted. When he first proposed the Bill of Rights, Madison indicated where in the Constitution each of them should be inserted.[156] The First Congress rejected this suggestion, which had the effect of de-anchoring the amendments from the bodies they were meant to restrict.[157]

As a result, the argument from structure tends to fall to arguments from text. It is far easier to read the text of the Amendments and look for principles and limits solely found there, without considering what Constitutional text they purport to amend. Thankfully, the records of the early Congress still exist, which helps shed light on exactly what provisions of the Constitution he intended to amend with his proposals, which can help us recapture their place within the overall structure.[158]

Another key thing to remember when looking to the amendments is that almost all of them protect multiple rights.[159] As a result, when making the structural argument as well as when asking if the text runs counter to that argument, it is important to note which right one is discussing. For example, the Supreme Court in *United States v. Verdugo-Urquidez* relied

[156] Chapman and McConnell, *supra* note 27 at 1722.
[157] Ibid.
[158] 1 Annals of Cong. 434 (1789) (Joseph Gales ed., 1834).
[159] The Second, Third, and Seventh being the notable exceptions.

on the term "the people" to restrict the application of the warrant requirement outside the United States. But the term "the people" does not appear in the Warrant Clause; rather, it describes whose persons, houses, papers, and effects are secured from unreasonable search and seizure. The Warrant Clause is more properly read as a restriction on the authority of courts to issue the warrant.[160] Likewise, the term appears in the First Amendment, but only in reference to the rights of assembly and petition. The Establishment Clause, Free Exercise Clause, Free Speech and Press clauses are all written as restrictions on the power of Congress, which is why Madison proposed including them in Article I, Section 9.[161]

Other Amendments, such as the Fifth and Sixth, use far broader terminology, such as "person" and "the accused." These rights apply to all who find themselves subject to the judicial power of the United States, regardless of location or citizenship. Even here though, it is important to recognize that these Amendments cover a wide variety of topics. For example, while the Fifth Amendment's protection against self-incrimination and due process are often referred to as "trial rights,"[162] the Takings Clause is of an entirely different nature.[163] Yet it too speaks to persons, rather than "the people."

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[160] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 774 (February, 1994).

[161] 1 Annals of Cong. 434.

[162] But see Godsey, *supra* note 84, arguing that courts have spent more time focusing on whether or not the conditions which adduced the confession were coercive, rather than examining the attempt to introduce the confession at trial. This is important, because there will almost never be a situation in which a coerced confession will be introduced in a United States court sitting outside the United States. Thus, the extraterritorial application of the Fifth Amendment in this case will arise when examining confessions which are obtained overseas, but eventually submitted within courts sitting in the United States. It is only this individual rights reading of the Self Incrimination Clause which makes this a question of extraterritorial application.

[163] Unfortunately, the courts have not been willing to read the Takings Clause as applying extraterritorially. See, e.g., Jeffrey Kahn, *Zoya's Standing Problem, Or, When Should the Constitution Follow the Flag?*, 108 Mich. L. Rev. 673 (March, 2010); *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007); *Ashkir v. United States*, 46 Fed. Cl. 438 (2000). *But see Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1957) (holding that Takings Clause extends to foreign-owned property outside the United States).

The Eighth Amendment's restriction on excessive fines and "cruel and unusual punishment" is even more open ended. Nothing in the language of the Amendment is obviously limited to the United States.[164] Can Congress or the Executive escape the constraints of this Amendment merely by requiring that certain individuals be held outside the territorial boundaries of the United States? The argument from structure would say no, because the limitation on cruel and unusual punishment is written as a limitation on Government power, and the text of the Amendment would bolster that claim.

As to those Amendments that do refer to "the people," there is an argument to be made that this text would overcome the argument from structure. At least in some cases, it is hard to imagine how they would apply extraterritorially. For example, the right of assembly and petition are almost exclusively domestic rights. A petition could begin overseas, but its presentment to Congress is likely to occur only within the United States. It is possible Congress could pass a law restricting such petitions, but it is does not seem feasible that such a law would be proposed, let alone passed. Congress is free to ignore any petitions it receives, making such a law unnecessary.[165] As for laws preventing assembly, the general rule in international law is that countries regulate within their own territories.[166] Thus, any restrictions on gathering outside a U.S. embassy, for example, would be the domestic law of the country where the protest was occurring, and whatever the extraterritorial reach of the Constitution, it cannot operate to restrict the powers of another government.[167]

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[164] U.S. Const., Amend. VIII.

[165] *See, e.g. Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984).

[166] See e.g. Luke Bell, *Boundary Dispute: The Presumption Against Extraterritoriality as Judicial Nondelegation*, 2017 B.Y.U.L. Rev. 427 (2017). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) (describing the territorial principle that under international law, a state may regulate acts that occur wholly or substantially within its borders).

[167] There may be a question if the foreign law is passed at the request of the United States. This was the allegation in *Atamirzayeva*, *supra* note 163, where Ms. Atamirzayeva's restaurant was seized by the Uzbekistan Government, allegedly at the

The Second Amendment protects the right of "the people" to keep and bear arms. Much like the right to assembly, it is hard to imagine a law which would restrict anyone outside the United States from bearing arms. Such laws would be the municipal laws of other countries. As such, there would be no argument that the United States was the actor restricting the right to bear those arms.[168]

Similarly, the Ninth and Tenth Amendments refer to "the people." The Tenth Amendment, itself a structural amendment, seems to me an easy case. It is restricted, by both its structure and its terms, only to those in the United States. It acts as a reservation of powers not delegated to the federal government, and holds undelegated powers in the hands of the states or the people respectively.[169] Given its concern with the structure of government and sovereign power, it makes no sense to read it as reserving power to a general class of people including all humans. And as Charles Black made clear when he proposed structuralism as a method of constitutional interpretation, its most basic characteristic is that it should make sense.[170]

The Ninth Amendment likewise refers to the rights of "the people" and was designed as an interpretive rule, noting that just because certain rights are not explicitly called out, this should not be read to mean they do

request of the United States. In that narrow case, there may be a claim that the United States government exercised its power. However, this would likely be a case where the textual limit to "the people" would be properly read to restrict the First Amendment to American citizens.

[168] Again, one could imagine a challenge to a statute that provided an enhanced criminal penalty for carrying arms while committing a felony on the high seas. I believe this argument would have been more easily dismissed prior to the Supreme Court's rulings in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), by relying on the language in the Second Amendment discussing militias. Given the Supreme Court's rulings, the argument that the Second Amendment applies on the high seas is actually stronger that it otherwise might have been. Nevertheless, I do not foresee such a challenge being successful, for the reasons of fidelity discussed more fully in the context of the Fourth Amendment, *infra*.

[169] U.S. Const., Amend. X.

[170] Black, *supra* note 1, at 22

not exist.[171] Here, the reference to the people is not as clearly restricted to those residing in the United States, because these rights are supposed to precede government. But, as discussed in more detail *infra*, fidelity of language would argue in support of such a reading.

This brings us to the Amendment which uses the phrase "the people" and which is most likely to be implicated overseas – the Fourth Amendment. The Fourth Amendment protects the right the people to be secure in their persons, houses, papers, and effects.[172] As noted above, the Supreme Court has read this reference to "the people" to be a term of art that refers to U.S. citizens and those non-citizens who have developed "substantial connections" to the United States. There is a certain narrative attractiveness to this reading. For one thing, it is consistent with the reading of the term "the people" in the Tenth Amendment. Furthermore, it coincides with the term "the people" used in the Preamble. It was not every person who established and ordained the Constitution. It was the people of the United States.

To the maximum extent practical, unless the text evidences a different meaning, the same terms should be read to have a consistent meaning throughout a document.[173] Here, the term "the people," as used elsewhere, cannot be read to be any broader than the reading given it by the *Verdugo-Urquidez* court. For that reason, its meaning should be interpreted consistently within the Fourth Amendment, since there is nothing in that Amendment that would give it a broader reading.[174] To that extent, unless the search is conducted against a United States citizen, or an alien who has

[171] See e.g. John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 Wm. & Mary L. Rev. 1321, 1365 (March, 2018); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 Colum. L. Rev. 498 (April, 2011).

[172] U.S. Const., Amend. IV.

[173] This is known as the Presumption of Consistent Usage canon of construction. *See, e.g. United States v. Castleman*, 572 U,S. ___ (2014), slip op. at 1-2 (Scalia, J., concurring).

[174] Of course, this argument only holds up to the extent one believes the text is the appropriate unit of analysis. As discussed in Part II(C)(b), *supra*, this is not the only way to interpret even fairly clear constitutional text.

substantial ties to the United States, the Fourth Amendment should not be read to apply extraterritorially.

Given this concession, one might argue that since the Constitution is ordained and established by "the people of the United States" none of it should apply overseas. This relies on the social contract theory of the Constitution.[175] However, even the social contract theory does not preclude the extraterritorial application of the Constitution to those not part of the contract. This is so for two reasons: first, the structure of the Constitution, as noted above, sets up a limited government. These limits apply to all actions of the Government, irrespective of the target of those actions. The only question is who has the right to ask for those limits to be applied. This is where the second reason comes in: "the people" can authorize whomever they wish to act on their behalf, in this case in enforcing the limits "the people" established. They do this by opening up the pool of those who may seek to challenge government action using broader terms, such as "person" or "the accused."

The drafters of the Constitution, when they wished to limit its reach, knew how to do so. Some clauses are limited to citizens.[176] Some are limited to the people.[177] And some use broad language or do not indicate any limitations at all. It is this latter class of clauses that I believe apply extraterritorially based on the structure of the Constitution. In those cases, the writers of the social contract chose to open up its enforcement to all those effected by the exercise of power by the United States.[178] Thus, under the arguments put forth in this article, aliens would have "standing" to enforce those provisions that use broad language, such as "persons" or "the

[175] Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 917-918 (January, 1991)

[176] See e.g. U.S. Const., Art. I, Sec. 2, cl. 2 (limiting eligibility in the House to citizens); U.S. Const., Art. I, Sec. 3, cl. 3 (same for Senate); and U.S. Const., Art. II, Sec. 1, cl. 5 (President must be a citizen).

[177] U.S. Const., Amends. I, II, IV, IX, and X.

[178] To borrow from contract law, everyone would be properly considered a third party beneficiary of the limits on government power written into the Constitution, with the authority to enforce it on their behalf.

accused" as well as those provisions which do not provide any language indicating their object, such as the First Amendment's prohibition on Congress interfering with the free exercise of religion. In those cases where the language is limited to citizens or "the people," on the other hand, aliens without substantial connections to the United States would lack such standing.[179]

However, this still leaves open the question of what happens when the United States acts against its citizens abroad in a manner that, if it occurred domestically, would be a violation of the Constitution. No Supreme Court case has squarely confronted this issue. While the Court in *Verdugo-Urquidez* provided some practical problems with applying the Warrant Clause overseas, it based its ruling on the use of the phrase "the people" in the Fourth Amendment. There can be no question that a U.S. citizen is one of "the people" the Fourth Amendment was designed to protect. But what happens when the government wishes to search the foreign home of an expatriate? Under the arguments from structure, the Fourth Amendment would undoubtedly apply.[180]

HISTORICAL PRACTICE

Contrary to the Court's claim in both *Johnson v. Eisentrager*, and *United States v. Verdugo-Urquidez*, the extraterritorial application of the Constitution was not shocking or unknown to the founding generation. Professor Nathan Chapman of the University of Georgia has outlined the evidence from this period in an article examining the treatment of pirates.[181] He notes that in the early years of the Republic, "[t]he prosecution and

[179] For purposes of this argument, I am choosing to adopt the *Verdugo-Urquidez* majority's definition of "the people."

[180] It is beyond the scope of this article to address the practical problems with enforcing the Warrant Clause outside the United States. However, one answer was offered by Justice Stevens in his concurrence in *Verdugo-Urquidez*, which was to rely on the reasonableness requirement.

[181] Nathan S. Chapman, *Due Process Abroad,* 112 Northwestern U. L. Rev.377 (2017). Part IV of the article, pages 405-413 provides an overview of this history.

punishment of extraterritorial crimes, including crimes committed by aliens, was one of the federal government's top priorities."[182]

Among the evidence Professor Chapman marshals is the fact that, unlike the United Kingdom, which provided for less process,[183] or Spain, which allowed court-martial, death and dismemberment,[184] the United States required that all captured pirates be returned to the United States for a full trial before an Article III court. It was universally understood and respected that during the earliest years of the Republic, even alien pirates captured abroad were entitled to be returned to the United States for a trial under the auspices of the Constitution.[185] Absent this respect for due process, the Executive would have been well within its rights to order summary execution of those caught committing piracy.

The extension of rights to aliens abroad was also demonstrated by the right of those subject to illegal captures on the high seas to sue U.S. officers in U.S. courts.[186] It was quite commonplace for courts within the United States to hear claims of trespass against U.S. officers for either exceeding the scope of their letters of marque and reprisal, or for capturing ships that were not engaged in piracy.[187]

In a narrower extraterritorial application of the Constitution, the United States Court of Claims vindicated a claim by Boston merchants concerning the destruction of their property, by a U.S. officer, in

[182] Id. at 409, noting that admiralty and maritime crimes accounted for more than 30% of federal indictments.

[183] The British allowed pirates to be tried at the closest practical location and did not insist on the full process accorded to British subjects in England. Id., Part II(c).

[184] Id. at 422.

[185] Id. at 413-417.

[186] Id. at 432-433. See also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 774-79 (1994); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L. J. 393 (1995); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L. J. 77 (1997).

[187] Chapman, *supra* note 181, at 432-433. See also James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1905-1906 (2010).

Nicaragua.[188] In this case, these Boston merchants shipped a large load of gun powder to San Juan, Nicaragua, also known as Greytown.[189] The town had been overtaken by "marauders and freebooters."[190] They damaged property of U.S. citizens and even subjected an accredited foreign minister of the United States to great indignity and violence.[191] A Commander Hollins was dispatched to Greytown on the warship Cyane.[192] After communicating with the town and having his demands for indemnity for the destruction of property ignored, he opened fire upon Greytown, battering down most of the buildings and sending a force ashore to burn down what was left.[193] Commander Hollins was concerned the inhabitants of Greytown may take revenge by firing the building in which the gunpowder, some 21,000 pounds, was housed, and so he seized it and cast it into the bay, destroying all of it.[194]

The merchants sued the United States, arguing that Hollins had destroyed their property without just cause, that he did so under color of his authority as a U.S. officer, and that they were entitled to restitution for the loss of their gunpowder.[195] Despite the actions occurring in Nicaragua, far outside the territory of the United States, the court had issued a damages judgment in the amount of $6000 against the United States.[196] It did so by holding the destruction of the powder was a taking of private property for public use.[197]

While this is a closer case of the extraterritorial application of the Constitution, as the plaintiffs were themselves U.S. citizens, there is no doubt that the application of the Takings Clause is only appropriate if it

[188] *Wiggins v. United States* (The Wiggins's Case), 3 Ct. Cl. 412 (1867).
[189] *Id.* at 421.
[190] *Ibid.*
[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid*.
[195] *Id.* at 422-423.
[196] *Id.* at 424.
[197] *Id.* at *5.

reaches property outside the territorial boundaries of the United States. This is a far cry from the Supreme Court's pronouncement in *In re Ross* that the Constitution has no operation in another country, and it predates *Ross* by a quarter century. It provides more evidence that the historical understanding was that the Constitution could be enforced even when challenging actions occurring overseas.

IV. CONCLUSION: THE CONSTITUTION ABROAD

This article has argued that Professor Charles Black's theory of judicial interpretation which uses the structure of the Constitution as its starting point can provide valuable insight to the increasingly important question of whether or not the Constitution should be given any force and effect outside the territorial boundaries of the United States. It posits that the structure of the Constitution indicates that courts should extend the protections of the document to any action of the Government, regardless of where it may act. But it notes that not everyone will have the appropriate connections with the United States to invoke each and every provision. Nonetheless, because the Framers envisioned a government of limited powers, placed strict limits on those powers, and wrote certain amendments in broad and sweeping language, it is a mistake to hold that the Constitution only applies within the territorial boundaries of the United States, or that if it applies abroad, it does so only where U.S. citizens are concerned.

I recognize that this theory does not comport with the current jurisprudential landscape regarding the extraterritorial application of the Constitution. To fully realize my vision, changes to some long-held precedents would need to be made. But not nearly so many as one might at first imagine. The biggest immediate victims would be the *Insular Cases*, which I have elsewhere critiqued.[198] These cases have been roundly criticized by both members of the Court[199] and academics.[200] Other cases,

[198] Tauber, *supra* note 95.

[199] *Reid*, *supra* note 107, at 14.

[200] Neil Weare, *Why the Insular Cases Must Become the Next Plessy*, Harv. L. Rev. Blog, March 28, 2018 (available at https://blog.harvardlawreview.org/why-the-insular-

such as *Verdugo-Urquidez* may already find themselves undercut, as Justice Kennedy was able to elevate the "impracticable and anomalous" standard, first proposed by Justice Harlan in *Reid*, to a majority position in *Boumediene*.[201]

Overall, I believe that the argument from structure is true to the original understanding of the government set up by the Framers and is supported by the early practice of the legislative, executive, and judicial branches. I think it can provide a useful analytical tool for judges who are increasingly confronted by questions of the extraterritorial application of the Constitution. I also believe it has the potential to provide a unifying method of addressing these questions that piecemeal decision-making being engaged in by courts currently lacks.

cases-must-become-the-next-plessy/, last visited July 5, 2018).

[201] And because I rely on the *Verdugo-Urquidez* majority's definition of "the people" there may not be a need to overturn it, at least initially.